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March 24, 2006

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United States Department of the Interior
1849 C St. NW
Washington, DC, 20242

Lieutenant General Carl A. Strock
Commander and Chief of Engineers
HQ, United States Army Corps of Engineers
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Dale Hall, Director
U.S. Fish and Wildlife Service
1849 C St. NW
Washington, DC, 20242

Sixty-Day Notice of Intent to Sue under Section 7 of the Endangered Species Act for Failure to Consult on "A Conceptual-Level Strategy for Avoiding, Minimizing, & Preserving Aquatic Resource Habitat in the Sunrise-Douglas Community Plan Area"

Dear Administrator Johnson, Secretary Norton, Lieutenant General Strock and Director Hall:

Pursuant to Section 11 of the Endangered Species Act ("ESA"), 16 U.S.C. § 1540, this letter serves as formal notice on behalf of California Native Plant Society, Defenders of Wildlife, and Butte Environmental Council,¹ all non-profit conservation groups with an interest in the protection of vernal pool habitat in California's Central Valley and its endemic species, of their intent to sue the Environmental Protection Agency ("EPA"), Fish and Wildlife Service ("FWS"), and U.S. Army Corps of Engineers ("the Corps") for violation of Section 7(a)(2) of the ESA, 16 U.S.C. § 1536(a)(2), in connection with adoption of the above-referenced "Conceptual-Level Strategy for Avoiding, Minimizing, & Preserving Aquatic Resource Habitat in the

¹ The addresses and telephone numbers of these organizations are listed at the end of this letter.

Arthur:
Ken
Sanchez

Administrator Johnson, USEPA
Secretary Norton, USDO
Lieutenant General Strock, USACE
Director Hall, USFWS

March 24, 2006
Page 2

Sunridge-Douglas Community Plan Area" (hereinafter "Strategy"). In particular, EPA, FWS and the Corps failed to undertake consultation for the Strategy or to ensure that the Strategy "is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification" of critical habitat. 16 U.S.C. § 1536(a)(2).

Factual Background

The area subject to the Strategy contains some of California's last remaining vernal pool habitat. A vast system of vernal pools, which are small seasonal wetlands, once blanketed the floor of California's Central Valley. Today, these vernal pools are a unique, irreplaceable, and highly endangered habitat. By 1990, between 80-90% of historic pools had been lost to urbanization, farming, or other forms of development. Recovery Plan for Vernal Pool Ecosystems in California and Southern Oregon at I-1 (hereinafter "Recovery Plan").

Many of the few remaining, high-quality vernal pools lie within the Sunridge-Douglas Community Plan Area ("SDCPA"), which encompasses a large, contiguous swath of intact vernal pools noted by experts as remarkable for their endemic biodiversity. The SDCPA faces intense political pressure for development because it is within an urban growth area. The pools are habitat for two federally listed animal species, the vernal pool fairy shrimp (*Branchinecta lynchi*) and the vernal pool tadpole shrimp (*Lepidurus packardii*), Recovery Plan at II-191, II-203, III-104, III-105, as well as two federally listed plant species, Sacramento Orcutt grass (*Orcuttia viscida*) and slender Orcutt grass (*Orcuttia tenuis*), *id.* at II-79, II-87, III-88, III-99. The vernal pool fairy shrimp is a federally listed threatened species; the vernal pool tadpole shrimp is a federally listed endangered species. 59 Fed. Reg. 48,136 (Sept. 19, 1994). Both live exclusively in vernal pools and are "ecologically dependent" on natural seasonal fluctuations in undisturbed vernal pool habitat. *Id.* Sacramento Orcutt grass was listed as endangered and slender Orcutt grass was listed as threatened in 1997. 62 Fed. Reg. 14,338 (Mar. 26, 1997).

It is our understanding that the Strategy is an outgrowth of a series of meetings initiated in March 2004 by Congressman Doug Ose, the Corps, EPA, FWS, local agencies, and development interests. Local environmental groups and the public were not invited. These meetings, designed to address the narrow-range of concerns expressed by the development community, eventually led to the finalization, in June 2004, of the Strategy, which envisions the construction of approximately 22,000 new homes on 6,000 acres of land in the heart of the delicate vernal pool habitat within the SDCPA. The Strategy makes both large and small land use and design decisions. Its associated preserve map, which sets out "mapped boundaries" of "preserve areas" that "are the smallest" acceptable to the agencies, determines the shape and form of development in the SDCPA. Strategy at 1. Despite this fact, the Strategy itself contains no discussion of the needs and biology of the vernal pool tadpole shrimp and vernal pool fairy shrimp or of the two grass species.

The Strategy explains that its terms "should be used by developers and planners to design and plan projects in the SDCPA. The Agencies will use the strategy to aid in the review of proposed development and evaluate the probable individual and cumulative effects of the

Administrator Johnson, USEPA
Secretary Norton, USDO
Lieutenant General Strock, USACE
Director Hall, USFWS

March 24, 2006

Page 3

developments. Strategy at 1. The developers' memorialization of this process states that the Strategy and its attached map "have the blessing of property owners in the planning area." Letter dated Oct. 12, 2004 from John Hodgson, The Hodgson Company, to the U.S. Army Corps of Engineers, the U.S. Fish and Wildlife Service, and the U.S. Environmental Protection Agency (hereinafter "Memorialization") at 3. Specifically, for development projects that are "subject to [agency] review" and for which the agencies "determine that submissions conform to" the Strategy, the developers "understand that EPA will remove its option to elevate [development] permits under the Section 404(q) Memorandum of Understanding, that the Service will issue no jeopardy biological opinions in a timely manner for each project and that the Corps will prepare an individual record of decision for each application, will make a finding of no significant impact ('FONSI') under NEPA for each application and will issue the required permit in due course." Memorialization at 4-5.

The Corps and EPA have confirmed that they share the developers' understanding of the Strategy. Letter dated Oct. 29, 2004 from Michael Jewell, Chief, Central California/Nevada Section of the U.S. Army Corps of Engineers, to John Hodgson (agreeing with developers' "summary of the discussions" and indicating intend to use the map "in making final permit decisions"); Letter dated Nov. 8, 2005 from Karen Schwinn, Associate Division Director, EPA Region IX Water Division, to John Hodgson ("I can reaffirm our prior commitment to you and the other landowners, provided the projects comply with a reasonable degree of variability with the federal agencies' Conceptual Strategy and associated preserve map" and are in compliance with 404(b)(1) guidelines).

Applicable Law

Section 7(a)(2) of the ESA requires that each federal agency "shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency (hereinafter in this section referred to as an "agency action") is not likely to jeopardize the continued existence of any endangered species or threatened species. Or result in the destruction or adverse modification of [critical] habitat." 16 U.S.C. § 1536(a)(2). To fulfill this mandate, the acting agency must consult with USFWS whenever such actions "may affect" a listed species. 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(a).

Consultation under Section 7(a)(2) results in the preparation of a biological opinion by USFWS that determines if the proposed action is likely to jeopardize the continued existence of a listed species or adversely modify a species' critical habitat. The biological opinion must include a summary of the information on which it is based and must adequately detail and assess how the action affects listed species and their critical habitats. 16 U.S.C. § 1536(b)(3). Additionally, a biological opinion that concludes that the agency action is not likely to jeopardize a listed species or adversely modify its critical habitat must include an Incidental Take Statement which specifies the impact of any incidental taking, provides reasonable and prudent measures necessary to minimize such impacts, and sets forth terms and conditions that must be followed. 16 U.S.C. § 1536(b)(4).

Administrator Johnson, USEPA
Secretary Norton, USDO
Lieutenant General Strock, USACE
Director Hall, USFWS

March 24, 2006
Page 4

The biological opinion must include an evaluation of the "cumulative effects on the listed species." 50 C.F.R. § 402.14(g)(3). In addition to effects of other federal actions, "cumulative effects" include "effects of future State or private activities, not involving Federal activities, that are reasonably certain to occur within the action area of the Federal action subject to consultation." 50 C.F.R. § 402.02.

Throughout its analysis, the biological opinion must utilize the "best scientific and commercial data available." 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(d). The USFWS must consider all the relevant factors and articulate a rational connection between the facts and its ultimate conclusion.

If an action's impact on a species' habitat threatens either the recovery or the survival of a species, the biological opinion must conclude that the action adversely modifies critical habitat. The ESA defines critical habitat as areas which are "essential to the conservation" of listed species. 16 U.S.C. § 1532(5)(A). The ESA definition of "conservation" includes the recovery of species. See 16 U.S.C. § 1532(3).

Violation

The Strategy and its attached map, which describes the pattern of development, is a major federal action with the potential to jeopardize the listed species. It was approved by EPA, FWS, and the Corps without any Section 7 consultation, even though it authorized and specified the pattern of the development of crucial vernal pool habitat and thus is likely to adversely affect federally listed species and their critical habitat.

Subsequent events have confirmed the agencies' reliance on the Strategy as a decision document. Shortly after its adoption, FWS, recognizing that elimination of vernal pool habitat threatened species throughout the region, issued a comprehensive "Draft Recovery Plan for Vernal Pool Ecosystems in California and Southern Oregon." This plan, in development at the same time as the Strategy, represents the best available science on the remaining vernal pool regions. A final version of the Recovery Plan was finalized on December 15, 2005 and issued in March 2006.

The final Recovery Plan seeks to "stabilize and protect populations so further declines in species status and range are prevented." Recovery Plan at III-2. Because "habitat loss and fragmentation is the single largest threat" to all vernal pool species, including the shrimp and grass species, the plan recommends protecting "larger blocks of land...to provide for greater species and physical diversities, less vulnerability of the species populations to outside influences, [and] connectivity through land with natural habitat or compatible uses." *Id.* at III-3. While the Plan recognizes that "[a]ll land occupied by featured taxa is important for recovery or conservation," it identifies certain "core areas" which are "the specific sites necessary to recover these endangered or threatened species" and which "should be the initial focus of protection measures." *Id.* at III-5.

Administrator Johnson, USEPA
Secretary Norton, USDO
Lieutenant General Strock, USACE
Director Hall, USFWS

March 24, 2006
Page 5

One of these core areas largely overlaps with the SDCPA covered in the Strategy. The Mather Core Area ("MCA") in Southeastern Sacramento County, described *id.* at III-84, Fig. III-14b, IV-16, is under development threat due to the Strategy, which would allow at least 13% of it to be covered with buildings and suburban development. The MCA encompasses one of the largest remaining blocks of high-quality habitat in the Sacramento County and is significant habitat for these listed species. In fact, the largest number of remaining occurrences of both shrimp species occurs in Southeastern Sacramento County. *Id.* at II-194, II-206. This crucial area for both shrimp species is particularly threatened by "continued extensive urban development" in Southeastern Sacramento County. *Id.* at II-209, II-199. The Recovery Plan mandates that 85% of suitable vernal pool habitat for vernal pool fairy shrimp and 95% of vernal pool habitat for vernal pool tadpole shrimp be preserved within the Mather Core Area. *Id.* at III-104 - III-105. The Recovery Plan also mandates that 95% of suitable habitat for slender Orcutt grass be preserved within the Mather Core Area. *Id.* At III-99. Protection of the area is even more critical for the Sacramento Orcutt grass which grows only in "the Southeastern Sacramento Vernal Pool Region and has always been restricted to Sacramento County." *Id.* at II-88 (references omitted). Indeed, five of the remaining eight populations—70% of the occupied habitat—are concentrated into a single area of about 6 square kilometers (2.3 square miles) in the Rancho Cordova area east of Mather Field." *Id.* This concentration lies within the MCA, 95% of which must be protected for this species under the Recovery Plan. *Id.* at III-99.

In fact, "[p]rotection of vernal pool habitat is the overarching objective of this recovery plan." *Id.* at IV-1. Yet, the Strategy authorizes development of 13% of the land in the MCA, violating the Recovery Plan's goals for the vernal pool tadpole shrimp and both grass species and coming very close to violating the goals for the vernal pool fairy shrimp. Worse still, the Strategy designates areas for development that contain sensitive vernal pool complexes. Areas designated for preservation are designed at variance with basic conservation biology principles and, for the most part, preserve intermittent streams rather than rare vernal pools.

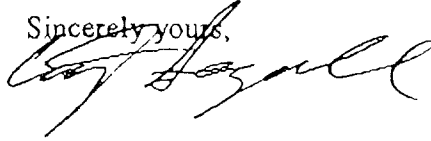
Since the issuance of the Strategy, EPA, FWS, and the Corps have begun reviewing proposals for development in fragile vernal pools habitat within the MCA, relying upon the Strategy to mitigate and expedite the pennits without ever having completed Section 7 consultation for the Strategy in violation of the ESA. Accordingly, if EPA, FWS, and the Corps do not act within 60 days to correct this violation of the ESA, California Native Plant Society, Defenders of Wildlife, and Butte Environmental Council will pursue litigation in federal court, seeking injunctive and declaratory relief regarding these violations, as well as legal fees and costs.

Administrator Johnson, USEPA
Secretary Norton, USDOJ
Lieutenant General Strock, USACE
Director Hall, USFWS

March 24, 2006
Page 6

Should you wish to discuss this matter, or feel that this notice is in error, please feel free to contact us at (650) 725-8571.

Sincerely yours,



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